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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

LULAC COUNCIL 11054, et al

Petitioners,

RONALD BRADLEY, et al,

v

WILLIAM G. MILLIKEN, et al, and the BOARD OF EDUCATION OF THE CITY OF DETROIT, et al,

Respondents.

BRIEF FOR RESPONDENTS WILLIAM G. MILLIKEN, ET AL, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Respondents Milliken, et al, accept petitioners' statement of the case except for their description of the trial court hearings pursuant to the Court of Appeals remand and of the District Court's subsequent order of August 7, 1978, as it pertained to provision of bilingual, bicultural programs.

The United States Court of Appeals for the Sixth Circuit remanded this cause to the District Court for consideration of further pupil reassignments, by an opinion and order dated August 4, 1976 (540 F2d 229). The District Court held eviden-

tiary hearings in April and September, 1977. Briefs were then filed by the parties and the Court heard oral arguments in April, 1978. During these oral arguments, the Court expressed a concern about the effect on the Court's pupil reassignment order of concentrating the school district's bilingual programs in one of the school district's eight regions. (Tr, April 24, 1978, pp 58-59)

Contrary to petitioners' assertion, the Court never expressed reservations about the need to continue bilingual education programs as desegregation occurred. Rather, the Court expressed a concern that concentration of bilingual programs in one region and exclusion of students participating in such programs from the pupil reassignment remedy was resulting in resegregation in that region. (Tr, April 24, 1978, pp 59-65)

In its order of August 7, 1978, the District Court did not simply order the school district to submit a pupil reassignment plan which "should 'make provisions for bilingual bicultural programs . . . '" as asserted by petitioners. Rather, the order was specific and mandatory. It required that:

> "The plan shall make provisions for bilingual/bicultural programs consistent with state law and prior orders of this court; where pupil reassignment materially alters current bilingual/bicultural programs, the Detroit Board shall create new programs to maintain the current level of bilingual/bicultural offerings."
> (Order of August 7, 1978, p 1, ¶ 3)

SUMMARY OF ARGUMENTS

Petitioners' motion to intervene, which was filed months after all hearings were concluded and after the District Court had already prepared its opinion, was untimely. The filing of the motion was unduly delayed. Granting of the mo-

tion would have necessitated further hearings, prejudiced the original parties and protracted the remedial proceedings for no good reason.

Provision of bilingual, bicultural education programs has never been an issue in this school desegregation case. Petitioners' right to such programs has been acknowledged by all parties and fully protected by the District Court. The decision of the Court of Appeals affirming the District Court's denial of the motion to intervene is not in conflict with decisions in other circuits.

The District Court and Court of Appeals correctly held that the Detroit Board of Education adequately represents petitioners' interest. In addition, plaintiffs adequately represent petitioners' interest and no other party has contested that interest.

ARGUMENT

I.

PETITIONERS' MOTION TO INTERVENE IS UNTIMELY.

Intervention of right or by permission may be granted only "upon timely application." FR Civ P, 24. At the time of petitioners' application on July 24, 1978, this case had been pending for almost eight years. The Court of Appeals had ordered consideration of further pupil reassignment by an opinion and order dated August 4, 1976. (540 F2d 229) The District Court held evidentiary hearings in April and September, 1977. Briefs were filed and the Court heard oral arguments in April, 1978. Well over three months after this argument and only two weeks before the District Court issued its opinion (460 F Supp 299), petitioners finally filed their motion to intervene.

In denying petitioners' motion to intervene, the District Court held:

> " . . . [T]his motion is untimely. LULAC did not apply for intervention until long after the evidentiary hearings were over and our opinion was prepared for filing. . . ." (A3)[1]

The Court also noted:

> "In addition, we decline to allow the proposed intervenors to intervene under Fed. R. Civ. P. 24(b). The motion to intervene is simply much too late. If the court were to allow intervention, the parties would have to relitigate issues that have already been extensively litigated at great expense. . . ."
> (A4)

Even under a liberal construction of the timeliness requirement, petitioners' motion to intervene was simply too late. Under the circumstances of the case, petitioners unduly delayed in the filing of their motion and permitting intervention would have prejudiced the original parties to the litigation. The April, 1978 proceeding which petitioners allege triggered their concern was the hearing of final oral arguments on a revised pupil reassignment plan. The evidentiary hearings had been completed months earlier. Briefs had been submitted weeks earlier.

After oral arguments were concluded, the Court began preparing its opinion. Anyone desiring to give further input to the Court at that point obviously needed to move with dispatch. Petitioners did not. Instead, they waited three months.

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[1]

References to pages in the appendix of petitioners' Petition for Writ of Certiorari will be designated (A.....).

By the time their motion to intervene was finally filed, the Court had already completed its opinion. The District Court expressly noted this fact as one of the reasons for denying the motion (A3)

Had intervention been permitted, at a minimum the Court would have been required to delay issuance of its opinion and to reopen the hearings to afford petitioners an opportunity to present their position. Petitioners assert that they only sought to participate in further hearings regarding issues yet to be resolved, but this cannot be so. Their concern was the impact on bilingual, bicultural programs of the pupil reassignment plan implemented by the District Court pursuant to its August 7, 1978 opinion and order. The Court could hardly have granted petitioners' motion to intervene and found thereby that they did have an interest which was subject to impairment and that they were not adequately represented and at the same time denied them any opportunity to present their position prior to its decision.

Granting of petitioners' motion to intervene clearly would have delayed conclusion of the remand proceedings. It would have necessitated further hearings and, at a minimum, partial relitigation of issues. Such a result would have been prejudicial to the original parties. As the Court of Appeals noted:

> ". . . This case is already ten years old. Permitting the appellants to participate as parties in the development of a supplemental reassignment plan would delay further these already protracted remedial proceedings without producing any countervailing benefit." (A8)

Petitioners' motion to intervene was both unduly delayed and prejudicial to the original parties. The motion was clearly untimely under the circumstances and was properly denied by the District Court.

II.

NO INTEREST OF PETITIONERS IS SUBJECT TO IMPAIRMENT IN THE PRESENT ACTION.

Petitioners may well have a substantial interest in the provision of bilingual, bicultural programs to students of limited English-speaking ability. Such an interest is not, however, necessarily or automatically an interest related to the subject matter of this action. This is a school desegregation case. There is no necessary nexus between provision of bilingual education and school desegregation. Thus, in order to establish an interest in this litigation within the meaning of FR Civ P, 24, petitioners must at least demonstrate that the District Court's orders impact on the provision of bilingual, bicultural education programs.

In their motion to intervene, petitioners merely alleged that remedial orders may impair their ability to protect their interests in bilingual programs. In their proposed complaint, they alleged that they are entitled to bilingual programs and that their interests must be taken into account. Not a single fact was alleged in either their motion to intervene or their proposed complaint to indicate that their statutory rights to a bilingual education have not been or will not continue to be respected. Neither the District Court nor any party has ever disputed their claim to certain bilingual education programs. Indeed, their right to bilingual education programs has been expressly acknowledged by the Court and the parties and such programs have been and continue to be provided.

In its order of August 7, 1978, directing the Detroit Board of Education to prepare a pupil reassignment plan, the District Court expressly required that:

> "The plan shall make provisions for bilingual/bicultural

> programs consistent with state law and prior orders of this court; where pupil reassignment materially alters current bilingual/bicultural programs, the Detroit Board shall create new programs to maintain the current level of bilingual/bicultural offerings."
> (Order of August 7, 1978, p 1, ¶ 3)

The Detroit Board prepared a plan and petitioners were permitted to file a response to that plan in the District Court even though their motion to intervene had been denied. In that response, petitioners stated:

> ". . . The plan merely indicates that certain numbers of children will be transferred between different schools. If those children are chosen arbitrarily without concern for bilingual needs, it is a virtual certainty that programs will be damaged.
>
> "It may be that the District intends to implement the submitted proposal by a bilingual-sensitive assignment policy. If so, the concerns expressed here may be unnecessary; however, there is no reflection of the intent to do this in the documents submitted. . . ." (Response of Hispanic Intervenors to Plans Proposed by the Detroit Board of Education, dated August 31, 1978, p 2)

The District Court has ordered the Detroit Board of Educa- to respect petitioners' statutory right to bilingual education programs. Petitioners themselves have admitted that their concerns can be protected under the reassignment plan submitted by the Board. The mere speculative possibility that despite all of this, petitioners' concerns might not be respected is not a sufficient interest to warrant intervention.

In *Moten* v *Bricklayers, Masons and Plasterers International Union of America,* 543 F2d 224 (CA DC, 1976), an employer sought to intervene in a civil rights action against a union just

prior to entry of a settlement order, expressing concern that provisions of the order might subject him to conflicting demands. The District Court denied intervention, noting that it would retain jurisdiction and only expected the employer to act in good faith. The Court of Appeals affirmed, stating at 543 F2d 234:

> "Upon our own construction of District Judge Robinson's judgement and order, upon our reading of his memorialization of good faith within the rubric of continuing jurisdiction, and upon the argument held before us, we are satisfied that the instant agreement can be given life without impairing or impeding the protection of any valid interests of employer Izzo (the only employer before us) and of other employers not party to this appeal."

So also here, the reassignment plan ". . . can be given life without impairing or impeding the protection of any valid interests . . ." of petitioners. The District Court has repeatedly indicated that it will protect bilingual/bicultural programs. If and when petitioners' statutory rights are ever actually threatened is soon enough to invoke the District Court's protection.

The conflict alleged by petitioners between the Court of Appeals decision in this case and other appellate decisions is nonexistent. In both *Morgan* v *Kerrigan,* 401 F Supp 216 (D Mass, 1975), *aff'd,* 530 F2d 401 (CA 1, 1976), *cert den,* 426 US 935, and *Evans* v *Buchanan,* 416 F Supp 328 (D Del, 1976), *aff'd in part,* 555 F2d 373 (CA 3, 1977), *cert den,* 434 US 880, *reh den,* 434 US 944, Hispanic organizations were permitted to intervene to represent students participating in bilingual education programs. The opinions cited by petitioners merely note that intervention was permitted. They are not rulings on motions to intervene. The opinions do not indicate why intervention was sought or permitted, whether it was opposed by any

party or what relationship existed between bilingual programs and the desegregation remedy. Respondents acknowledge that intervention may be appropriate in some cases. They simply assert, as the District Court and Court of Appeals found, that intervention is not appropriate in this case.

III.

PETITIONERS' INTEREST IS ADEQUATELY REPRESENTED BY EXISTING PARTIES.

Even if petitioners LULAC Council No. 11054, et al, had any interest which was subject to impairment, they still would have no right to intervene because their interest is adequately protected by existing parties.

In its memorandum and order denying petitioners' motion to intervene, the District Court held:

> "In any event, the defendant Detroit Board has more than adequately protected the interests of the proposed intervenors. At the latest hearings, the Detroit Board called as an expert witness Mr. Felix Valbuena, the Director of Bilingual, Bicultural Education for the Detroit Public Schools. *See* transcript, September 7, 1977, at 96. Mr. Valbuena made a careful presentation of the bilingual program in the city and explained the need to preserve those programs. The Detroit Board vigorously opposed every suggestion that would disturb current bilingual programs in Region 2. *See* Opinion, August 17, 1978 at 23-24. We are persuaded that the proposed intevenors could not have presented any better evidence in their own behalf." (A3)

The District Court also noted:

> "... Moreover, the intervenors could not possibly match the expertise of the Detroit Board in Bilingual/Bicultural Education. Since the Detroit Board and the intervenors have identical goals, no useful purpose could be served by granting intervention pursuant to Rule 24(b)." (A4)

The Court of Appeals expressly affirmed these holdings. (A7-8)

In addition, this case has been certified as a class action in which plaintiffs represent "all school children in the City of Detroit, Michigan" and "all Detroit resident parents who have children of school age." See *Bradley* v *Milliken*, 338 F Supp 582 (DC ED Mich, 1971). The individual petitioners obviously are members of that class.

The District Court held that plaintiffs did not adequately represent petitioners because it understood petitioners to be seeking exclusion from any pupil reassignment plan. (A2-3) However, petitioners stated in their brief in the Court of Appeals and in their petition for writ of certiorari that they do not seek exclusion from the pupil reassignment plan but rather only seek to ensure that the integrity of bilingual education programs is taken into account in implementing the reassignment plan. (See, e.g., pp 8-9 of the petition) As noted previously, the District Court has already ordered the Detroit Board to do so.

As petitioners are willing to participate in the pupil reassignment plan, there is, in fact, no conflict between their position and plaintiffs'. They are members of the class which plaintiffs represent. There is no reason why plaintiffs cannot adequately represent their interests. In fact, plaintiffs, in both their brief and oral argument in the Court of Appeals, asserted their willingness and ability to represent petitioners' interests.

As their interests are adequately represented by both plaintiffs and the Detroit Board of Education and are not contested by any other party, the District Court properly denied petitioners' motion to intervene of right on the ground that their interest was adequately represented by existing parties. [2] (A3-4)

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[2]

The Court of Appeals suggested that petitioners be permitted to participate in future proceedings as *amici curiae* and that the District Court consider their *amicus* views in evaluating any reassignments of Hispanic students. (A8) Respondents Milliken, et al, have no objection to petitioners' participation on that basis. Respondents do not accept, however, the Court of Appeals holding that petitioners must be permitted to intervene to present evidence on the question of whether the defendants practiced *de jure* segregation of Hispanics. There is no basis in fact or law for such a holding where, as here, no one, including petitioners, has ever asserted such a claim.

CONCLUSION

For the foregoing reasons, the Petition of LULAC Council No. 11054, et al, for Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit should be denied.

Respectfully submitted,

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